

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 May 2006

BALCA Case No.: 2005-INA-109
ETA Case No.: P2004-NJ-02506026

In the Matter of:

R & M GENERAL CONTRACTORS, L.L.C.,
Employer,

on behalf of

LEONARDO SAMPAIO SANTOS,
Alien.

Appearance: Armindo Viana/Rosaria M. Viana¹
Riverside, New Jersey
Pro Se for the Employer

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal

¹ On the ETA 750A form, the name "ARMINDO VIANA" is typewritten under the signature line for the Employer. However, the actual signature is "Rosaria M. Viana" (AF 73-74). We also note that Cassandre C. Lamarre, Esquire, had represented the parties in the above-captioned case (AF 79-80), but that the CO stated, in the Notice of Findings, that Ms. Lamarre withdrew her representation (AF 65).

Regulations (“C.F.R.”).² We base our decision on the record upon which the CO denied certification and the Employer’s request for review, as contained in the appeal file (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On December 12, 2001, the Employer, R & M General Contractors, L.L.C., filed an application for labor certification to enable the Alien, Leonardo Sampaio Santos, to fill the position of Stonemason (AF 73). The job duties for the position, as stated on the application, were:

Lays building materials such as stone for commercial/residential development projects. Pours, spreads and finishes all stone repair and builds foundations, walls, sidewalks, porches, steps, stairway, fireplaces, BBQ pits, arches, abutments and sewers. Cuts stone according to written specifications and shapes them preparatory to setting using chisel, hammer, grinder, power saw. Aligns stone with plumbing and creates geometric patterns. Spreads mortar over stone and sets them on place by hand or by crane, cleans surface using [sic] muriatic acid and brushes. Supervises one mason helper.

(AF 73, Item 13). The address where the Alien would work was listed as follows: “Different job sites all over NJ, PA, NY.” (AF 73, Item 7). The Employer set forth a basic pay rate of \$31.00 per hour and a 40-hour work week from 7:30 a.m. to 4:30 p.m., Monday through Friday (AF 73, Items 10-12). The only job requirement was three years of experience in the job offered (AF 73, Item 14). The application was submitted under the Reduction in Recruitment (“RIR”) process (AF 69, 91).

On July 20, 2004, the CO issued a Notice of Findings (“NOF”), in which she did not directly address the RIR issue, but proposed to deny certification on the grounds, *inter alia*, that the Employer had not established that the job opportunity meets the definition of “Employment” as set forth in Section 656.3. Specifically, the CO found that the Employer did not document that there is a *bona fide*, permanent, full-time year-round position for an employee other than

² This application was filed prior to the effective date of the “PERM” regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

oneself; nor did the Employer document that the job opportunity has been and is clearly open to any qualified U.S. worker under Section 656.20(c)(8) (AF 64-66). Following the CO's grant of the Employer's request for an extension (AF 58), the Employer submitted its rebuttal on or about September 27, 2004 (AF 15-57). However, in the Final Determination, dated October 8, 2004, the CO found the rebuttal unpersuasive and denied certification on the above-stated grounds (AF 12-14). On November 8, 2004, the Employer requested a review of the denial (AF 1-11). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals (Board).

On February 1, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. Although no additional brief or statement of position was filed, Employer previously set forth the grounds for appeal in the Request for Review (AF 1).

DISCUSSION

In the NOF, the CO stated, in pertinent part:

Section 656.20(c)(8) requires that the job opportunity has been and is clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be bona fide and that the job opening as described on Form ETA 7-50 actually exists and is open to U.S. workers. Pursuant to CRF [sic] 656.3 DEFINITIONS, "employment" means permanent full-time work by an employee for an employer other than oneself.

The listing for your FEIN in the New Jersey Unemployment Insurance (UI) system has been inactive since June 23, 2002. Therefore, it does not appear that a job opening exists to which U.S. workers can be referred.

You may rebut this finding by:

Submitting evidence that clearly shows that the job offered constitutes permanent full-time employment in the context of your business operation. Rebuttal must include:

1. The number of years you have been in business. If you claim to have employees, you must document why there is no current active listing for your company in the State UI system. If there is an active listing, you must furnish the name and number under which it is listed.
2. The total number of workers and the number of stonemasons on staff in each of the last three years (including the current year), their names and job duties,

whether full- or part-time, employee or non-employee. You must furnish copies of Federal W-2 or 1099-MISC forms, whichever are applicable, and Federal Quarterly Taxes, form IRS 941, for the year this application was filed through the present year.

3. Documentation must also include copies of applicable State Employer Quarterly Report, Employer Report of Wages and Withholding Tax, paid for all quarters from the year this application was filed up to and including the present year. Failure to file these reports is a violation of 20 CFR 656.20(c), which states that employer's job opportunity terms, conditions and occupational environment shall not be contrary to Federal, State or Local Law.
4. Employer must also document how he can guarantee permanent full-time year-round work performing the duties of stonemason as shown on the 7-50A form. Such documentation must include, but is not limited to, copies of contracts, invoices, etc for the year the application was filed through the present year. Since employment as stonemasons is often seasonal, documentation must include the winter months.

(AF 65-66).

The Employer's rebuttal consisted of a handwritten cover letter (AF 15-17), a typewritten statement signed by Rosaria M. Viana (AF 18), the Employer's AT&T bill, dated September 4, 2004 (AF 19), and the Employer's Federal Income Tax returns for 2001, 2002, and 2003 (AF 20-52).

In the Final Determination, the CO stated, in pertinent part, that the Employer had failed to provide the requested documentation, including: evidence to support a current active listing in the State UI system; W-2 or 1099-MISC forms; an employee list and relevant information regarding such employees; State Employer Quarterly Reports, Employer's Report of Wages and Withholding taxes; and/or copies of contracts, invoices; and documentation of stonemason work throughout the year, including the winter season. Furthermore, the CO noted that the Employer's 2003 Federal Income Tax returns did not list any amount under "Salaries and wages (other than partners)." Accordingly, the CO denied certification on the grounds that the Employer had failed to establish that it can guarantee permanent full-time work and/or that a *bona fide* job opening exists for U.S. applicants (AF 13-14). We agree.

The requirement of a bona fide job opportunity arises out of section 656.20(c)(8), which

requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co., Inc. and Alireza Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate) (the job must truly exist and not merely exist on paper). The employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker." *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*) (adopting *Pasadena Typewriter*); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*).

It is well-settled that the employer bears the burden of proof in certification applications. 20 C.F.R. § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). Since the Employer has failed to provide such documentation, we find that labor certification was properly denied.³

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.*, however, this panel has recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as here, when the Employer failed to establish the existence of a lack of a *bona fide* job opportunity. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

³ With the request for review, the Employer belatedly submitted some additional information (AF 1-2). However, it is well settled that evidence submitted after the issuance of the Final Determination cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Moreover, if such evidence were considered, it would tend to undermine the Employer's assertion that there is a *bona fide*, full-time position open to qualified U.S. workers. The limited additional evidence presented by the Employer indicates that it uses a staffing agency and only issues 1099s, not W-2s (AF 1-2). This suggests that the Employer hires "independent contractors," not full-time employees. Furthermore, as stated above, the Employer's 2003 Federal tax return does not list any amount for salaries or wages (AF 20).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.